

ISSUE DATE:

**March 28, 2013**



PL120586

Ontario Municipal Board

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Bruce McMillan  
Applicant: Jane McIver  
Subject: Minor Variance  
Variance from By-law No.: 508-1991  
Property Address/Description: Lot 6, Lot 7, Plan 156 Bayfield Ward  
Municipality: Municipality of Bluewater  
Municipal File No.: A3/12  
OMB Case No.: PL120586  
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**APPEARANCES:**

**Parties**

**Counsel**

Bruce McMillan

Barry Card

Jane McIver

Alan Patton

**MEMORANDUM OF ORAL DECISION DELIVERED BY R. ROSSI ON MARCH 13, 2013**

[1]Bruce McMillan (“Appellant”) has appealed to the Board a decision of the Committee of Adjustment that granted an application (with conditions) to Jane McIver (“Applicant”) for relief from the provisions of the Village of Bayfield Consolidated Zoning By-law No. 508-1991, as amended (“by-law”) in order to permit the use of the existing structure on her property to be used as a privately-owned beach house without kitchen facilities and

accessory to a proposed dwelling. The Applicant seeks to vary s. 17.1 of the by-law to include a “privately-owned beach house” as a permitted use. A municipally-owned beach house (“undefined”) is already permitted but the term “beach house” is also undefined in the by-law.

[2]The Applicant owns Lot 6, Plan 156, 75 Tuyll Street in the Bayfield Ward of the Municipality of Bluewater (“Bluewater”). McIver Holdings Inc. and McIver Developments Inc. own Lot 7, Plan 156, 75 Tuyll Street. Both lots are located on the west side of Tuyll Street with access to Lake Huron. In 2008, the Huron County Planning & Development Department recommended provisional consent be given to facilitate the creation of the two lots. In the same year, the Board approved a subsequent application to demolish an existing one-storey residence that straddles the lot line between Lot 6 and Lot 7 and authorized a series of variances to facilitate the creation of a new, single-detached dwelling on each lot. The Applicant’s ability to proceed with development of the lots is currently tied to the decision that emanates from this hearing, in that the westerly portion of the subject lands is zoned Natural Environment (“NE”) Zone, which permits only one residential dwelling per lot. The issue is that the existing below-top-of-bank structure sits in this zoned area and only one residential dwelling is permitted on Lot 6. The Applicant proposes therefore to designate the existing lakeside structure as a “private beach house”, thereby facilitating the creation of a planned new dwelling site above the top of bank on Lot 6.

[3]The Appellant is the adjacent property owner to the south (Lot 8). His below-top-of-bank cottage is situated some 20 feet from the subject structure. He expressed concerns with how the dwelling might be used with the new designation “private beach house.” His counsel, Barry Card, suggested the variance if authorized would introduce a use that has not been defined properly and established through controls that do not appear to last. He suggested that this proposal should have proceeded by way of rezoning.

[4]Ainslie Willock spoke for the Bayfield Ratepayers Association as an interested participant. Her 2012 letter and her oral evidence today echoed the Appellant's concern with an undefined definition for the structure. She suggested that the defined term "sleeping cabin" as defined in the by-law could serve as a better definition than that proposed by the Applicant.

[5]Craig Metzger is the Senior Planner for the County of Huron. Mr. Metzger was qualified to provide his professional land use evidence and expert opinion in this case. Mr. Metzger has been the planner involved in planning applications for this property since receipt of the first applications. He was the only witness to provide planning evidence in this case and it was on this evidence that the Board relied in arriving at its decision.

[6]The parties agreed that the broad direction of the province's upper-tier planning instruments regarding growth, intensification and development are met through the proposed development and corresponding variance. The planner then reviewed the tests for a minor variance as set out in s. 45(1) of the *Planning Act*. Referencing his policy excerpts from the Municipality of Bluewater Official Plan ("official plan") and the by-law as contained in Exhibit 1, these demonstrated how the proposed development of the subject land satisfy the policies of the official plan's Natural Environment goals as articulated (by ensuring compatible development, for example) as well as policies found in s. 6.4.6: Protection of Natural Environment Features (by reducing risk from natural hazards). In this regard, he pointed out that the Ausable Bayfield Conservation Authority also does not oppose the requested minor variance (Exhibit 1 Tab 5). Mr. Metzger opined that the proposal also fulfils the official plan's Settlement Areas policies. His uncontradicted evidence was that the variance maintains the general intent and purpose of the official plan.

[7]Second, he opined that the variance maintains the general intent and purpose of the zoning by-law. In terms of defining the structure, Mr. Metzger demonstrated how

planning staff have addressed the matter of defining the structure by including the proposed definition in the first condition that Bluewater and the County attach to the variance. In closing arguments, the parties' counsels agreed on improved wording of the "private beach house" definition that would serve to guide any future applications involving such structures in Bluewater. That definition is articulated in the Board's resulting order below. In the Board's determination, the proposed definition (and as modified herein) was given full consideration and thought by planning authorities and for all intents and purposes for this exercise, the definition is a reasonable one. Mr. Metzger addressed the suggestion of whether the structure could have been designated a "sleeping cabin", which is already defined in the by-law (s. 6.36). He responded that a sleeping cabin is a much smaller structure (its maximum size cannot exceed 21 square metres of total floor area) whereas the existing structure is approximately 60 square metres in size, and the existing structure is not to be used for sleeping accommodation. In the Board's view, not only does the proposed definition bring clarity to the general term "beach house" but it has the potential to assist with any future definitive work that municipal and county officials might wish to undertake to address the undefined term "municipally-owned beach house." That, however, is a matter for Bluewater and the County of Huron to consider and is not part of this process.

[8]The planner also explained that failing to designate the structure is preventing the Applicant from building the newer house above the top of bank as the zoning permits only one residential dwelling per lot. The redesignation of the structure will change the use and facilitate development of the lot. He opined that the new definition ensures through imposed conditions that there are no sleeping accommodations, food preparation, sanitary or plumbing facilities. Further, the variance will achieve this policy of one dwelling per lot as a general policy across Bayfield. The Board emphasizes the fact that the zoning already permits a municipally-owned beach house. Given this evidence, the Board finds persuasive Mr. Metzger's opinion that the variance maintains the general intent and purpose of the by-law.

[9]The planner opined that the variance is desirable for the appropriate development of the subject lands as it ensures that the existing structure moves to a less intensive use than that of residential dwelling below the top of bank. The beach house will not be a residence and this achieves the direction of keeping development out of the Natural Hazard Areas, identified as such by the conservation authority.

[10]Lastly, he opined that the variance is minor in that a municipally-owned beach house is currently permitted in the by-law and this variance simply changes the use to a less intensive one; that of private individual ownership versus municipal ownership. Further, by moving to a less intensive use and with no permission granted for commercial use of the structure, the planner opined that there are no adverse impacts created on the adjacent lots.

[11]Despite Mr. Card's suggestion that the conditions do not provide certainty for the building's use, the Board determines otherwise. If anything, the definition in the first condition provides sufficient clarity of what constitutes a "private beach house." The conditions that follow more than adequately place limits on the use therein and its function. This finding is buoyed by the expert witness's comprehensive review of the planning documents and municipal and county planning reports that address the variance. The Board finds planning merit in the introduction of the new use through a well-reasoned definition that not only gives sufficient direction and provides clarity for this and subsequent applications but as it wrote, might also assist Bluewater and the County of Huron in future work on the already-existing "municipally-owned beach house" definition.

[12]Finally, the Board is aware of the timing problem in this case where provisional consent has been granted but where two properties currently exist on a lot that permits only one residential dwelling. In essence, one cannot have the accessory use approved before the principal use exists. Accordingly, given that the Board will authorize this variance for the below-top-of-bank structure, the Board will withhold its order as Alan

Patton requested until such time as the municipality issues the building permit on Lot 6. This necessarily implies that the Applicant will have to satisfy municipal officials that she has met all of the conditions attached to the Board's authorization of the minor variance for the subject below-top-of-bank structure. Once the Board is notified by the municipality that the permit has been issued, it will release its final order.

[13]The Board determines that Mr. Metzger's planning evidence and his review of the four tests for each of the variances were helpful to the Board's determination of this appeal. The Board characterizes the planner's evidence as both persuasive and uncontradicted and was in fact the only professional planning evidence proffered to the Board. It is on this evidence that the Board relies in arriving at its decision that the proposed variances are minor and meet all four tests as set out in the *Planning Act*.

[14]The appeal is allowed in part by altering the wording of the first condition as follows: It deletes the wording in condition 1: "The property owner agrees that..." and it alters condition 1 to read: "The definition of a privately-owned beach house is a structure for the purpose of providing changing facilities, does not contain kitchen facilities and is not used for sleeping accommodation or dining;" The other 6 conditions remain unchanged (all 7 conditions are set out in Exhibit 1 Tab 11). In all other respects, the appeal is dismissed. The Board authorizes the minor variance as requested but withholds its order until notice is received from the municipality that the building permit has been issued for the new dwelling above the top of bank.

"R. Rossi"

R. ROSSI  
MEMBER